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**THOMAS F. MCFARLAND**

April 10, 2008

**By e-filing**

Anne K. Quinlan, Esq.  
Acting Secretary  
Surface Transportation Board  
395 E Street, S.W., Suite 1149  
Washington, DC 20024

Re Finance Docket No 35121, *Burlington Shortline Railroad, Inc., d b a Burlington Junction Railway -- Acquisition and Operation Exemption -- BNSF Railway Company*

Dear Ms. Quinlan:

Hereby transmitted is a Petition For Rejection Or Stay, for filing with the Board in the above referenced matter

Very truly yours,

*Tom McFarland*

Thomas F. McFarland  
*Attorney for Ozinga Bros., Inc.*

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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BURLINGTON SHORTLINE )  
RAILROAD, INC , d.b a. BURLINGTON ) FINANCE DOCKET  
JUNCTION RAILWAY -- ACQUISITION ) NO 35121  
AND OPERATION EXEMPTION -- BNSF )  
RAILWAY COMPANY )

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PETITION FOR REJECTION OR STAY

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OZINGA BROS., INC.  
2255 South Lumber Street  
Chicago, IL 60616

Petitioner

THOMAS F McFARLAND  
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mcfarland@aol.com

Attorney for Petitioner

DUE DATE: April 10, 2008

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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BURLINGTON SHORTLINE	)	
RAILROAD, INC , d b a BURLINGTON	)	FINANCE DOCKET
JUNCTION RAILWAY -- ACQUISITION	)	NO 35121
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RAILWAY COMPANY	)	

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**PETITION FOR REJECTION OR STAY**

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Pursuant to the Board's procedural decision served April 3, 2008, OZINGA BROS , INC (Ozinga) hereby petitions for rejection or for stay of a Notice of Exemption filed by BURLINGTON SHORTLINE RAILROAD, INC., d.b a BURLINGTON JUNCTION RAILWAY (BJRY) The Notice is for an exemption from 49 U S C. § 10902 for BJRY's acquisition and operation of trackage at Montgomery, IL presently operated by BNSF RAILWAY COMPANY (BNSF) <sup>1/</sup>

Ozinga is one of the leading material supply companies in the Midwest It has been in business for 80 years It has over 400 redi-mix trucks and more than 1,000 employees.

Ozinga's interest in this matter is explained in the verified statement of Mr Bruce Betts, which is attached to this Petition as Appendix 1

**Petition for Rejection**

The Notice should be rejected as incomplete and materially misleading in multiple respects

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<sup>1/</sup> Incorrectly referred to in BJRY's Notice as BNSF Railroad Company

The Notice does not identify the nature of the proposed acquisition as a purchase, lease, operating agreement, or easement. The Notice merely addresses the proposed operation, i.e., "BJRY will replace BNSF as the operator of the local operations at Montgomery" (at 4). It is not clear whether the term "BNSF Leased Lines" in Exhibit A-1<sup>2/</sup> of the Notice is meant to refer to lines to be leased by BJRY from BNSF, or to lines already leased by BNSF from third parties. Assuming the former was intended, that intent is contradicted in the Caption Summary attached as Exhibit C of the Notice, which refers to BJRY as having filed a notice of exemption "to purchase and operate a rail line" (Ex. C at 1). BJRY's failure to have identified the nature of the proposed acquisition is materially misleading because BNSF would have a residual common carrier obligation to operate the rail line if the transaction is a lease, operating agreement, or easement, but not if the transaction is a purchase.

The description of the rail line to be acquired and operated in the Notice at page 4 and in the map attached as Exhibit A-1 of the Notice is so vague as to be unintelligible. It is not at all clear whether authority or an exemption is required for operating the numerous tracks shown on that map in addition to Track Nos. 3930 and 3905 for which an exemption is sought. Not all of those tracks appear to be exempt from the requirement of acquisition authority by virtue of 49 U.S.C. § 10906. For example, Track No. 3904 appears to be a through connecting track between Track Nos. 3930 and 3905. Track Nos. 3907, 3931, 3916 and 3915 may not be exempt industrial tracks. It is not clear whether BJRY is acquiring an interest in Track Nos. 3901 and 3902 on which interchange with BNSF will take place, or whether BJRY requires such an interest. In

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<sup>2/</sup> The map is prefaced by a notation that it is Exhibit A-1, but the map itself is marked as Exhibit I-1.

addition, there is no explanation of the trackage shown on the right side of the map, which also appears to include BNSF Milepost No 39

The Notice and map are materially misleading in that they do not identify or depict approximately 40 acres of land owned by Ozinga adjacent to the yard tracks. Ozinga has a ready-mix plant on that land. The Notice does not acknowledge Ozinga's attempts to obtain rate quotations and/or the right to switch that has now been conveyed to BJRY

There is no explanation in the Notice of the identity of the person who verified factual matter in the Notice (Robert Wingate), nor is there an explanation of the basis for the knowledge of that individual in relation to the rail line under consideration

In sum, the Notice fails to meet minimum standards for notification to the public of the nature of the transaction and identification of the trackage involved. Consequently, the Notice should be rejected

#### **Petition for Stay**

The factual predicate for a stay is contained in the verified statement of Mr. Bruce Betts of Ozinga, which is attached to this Petition as Appendix 1

Ozinga is likely to prevail on the merits of its opposition to the proposed transaction because regulation of the transaction is required to carry out the following national rail policies:

- (1) to foster sound economic conditions in transportation (49 U.S.C. § 10101[5]), and
- (2) to encourage honest and efficient management of railroads (49 U.S.C. § 10101[9])

The Notice of Exemption is missing basic information that would enable Ozinga to evaluate the effect of the transaction upon it. A formal application under 49 U.S.C. § 10902, or

at least a Petition for Exemption setting forth the basic facts, is required to carry out the above rail policies

For example, Mr. Betts' statement details Ozinga's negotiations with BNSF over a lengthy period for reasonable rail rates to Ozinga's facilities on the involved rail line. Despite BNSF's knowledge of those negotiations, as well as Ozinga's interest in providing rail switching service on the line, Ozinga was blind-sided by the Notice of Exemption. At a minimum, the Notice should have identified the effect of BJRY's operation of the rail line on Ozinga.<sup>3</sup> BNSF has been known to tack onto its rates an amount corresponding to the division of revenue that it pays to its Class III connecting rail carrier. BNSF does so notwithstanding the cost saving that it realizes as a result of no longer being required to perform expensive terminal switching. The effect of BNSF's action in that respect is a significant rail rate increase for shippers located in that terminal area.

It is no answer to contend that the regulations do not require this information in a Notice of Exemption. The regulations are minimum evidentiary requirements designed for application to non-controversial, run-of-mill transactions. Where, as here, there is a significant history of rate and service negotiations involving a potential major shipper or rail operator on the line, it is not permissible for that shipper to be blind-sided by the filing of a Notice of Exemption that wholly disregards the interest of that shipper. The matter should have been disclosed in response to the regulation requiring a brief summary of the transaction (Notice at 3).

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<sup>3</sup> It is small comfort to Ozinga that BJRY's headquarters is located 185 miles from the rail line under consideration, which supposedly would result in improved service compared to BNSF, whose headquarters is located a greater distance away from the line (Notice at 4). BNSF undoubtedly has switching personnel located much closer to the rail line than the 185-mile distance to Burlington, IA.

The Board should require the filing of a Section 10902 application or at least a Petition for Exemption that would provide an adequate opportunity for Ozinga to ascertain the likely effect of the acquisition and operation on it, and to permit it to either endorse the transaction, oppose it, or seek a condition or conditions to its approval that would adequately protect Ozinga's interests.

Ozinga would be irreparably harmed unless the proposed transaction is stayed. In that event, Ozinga would lack the legal means to ascertain the effect of the transaction on its interests until it was too late to protect its interests. Ozinga's competitive position would be irrevocably harmed before the transaction could be undone by a cumbersome petition to revoke the exemption for acquisition and operation.

BJRY and BNSF would not be seriously harmed if the transaction were to be stayed. BNSF operated the involved rail line for many years. Apparently that operation was successful. Thus, BNSF refused to sell the line to Ozinga on several occasions before BNSF agreed to convey the line to BJRY.

A stay would further the public interest. There is a strong public interest in serious and thoughtful consideration of the issues in an acquisition and operation case, especially when the interests of third parties are called into question, such as the interests of Ozinga which may require the Board's protection in the case at hand. That is simply not possible under extremely accelerated class exemption procedure.

**CONCLUSION AND REQUESTED RELIEF**

WHEREFORE, for all the reasons stated, the Notice of Exemption should be rejected as not in substantial compliance with the Board's regulations implementing 49 U S C § 10902. If the Petition is not rejected, it should be stayed pending Board consideration of the propriety of accelerated class exemption procedure in the case at hand.

Respectfully submitted,

OZINGA BROS , INC  
2255 South Lumber Street  
Chicago, IL 60616

Petitioner

*Thomas F McFarland*

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Attorney for Petitioner

DUE DATE: April 10, 2008



## APPENDIX 1



April 9, 2008

To Whom It May Concern

My name is Bruce A Betts I am a Transportation and logistics professional with more than 40 years experience, 34 of which were with railroads including CSX, Iowa Interstate and Chicago Port Railroad Company In July 2003 I accepted a position with Ozinga Bros , Inc. (Ozinga), a large group of ready mix concrete and aggregate distribution companies that has been privately held and operated by the Ozinga family for 80 years. Among other duties I am responsible for facilitating our potential for growing rail business Of over 200,000 railcar equivalents of aggregate traffic annually less than 3,000 currently move via rail

We have been pursuing a rail operation on the Burlington Northern Santa Fe (BNSF) at Montgomery, Illinois since prior to my joining Ozinga in 2003 The original operation involved purchase of a limestone quarry in Savanna, Illinois with shipment of carloads of limestone to our facility in Montgomery, Illinois Starting at 1,500 carloads per year, we expected 5 year growth to be a minimum of 5,000 possibly as much as 10,000 cars per year At that time BNSF offered a near competitive rate on single and multiple railcars We requested a slight reduction in order to offset the cost of building and maintaining rail on the property We were surprised to have the BNSF return a rate nearly double the original We were advised this was necessary due to general congestion. At that time we offered to run our own train with personnel certified by the BNSF and even discussed funding the configuration of the rail line entering Aurora to directly connect with the rail line to Montgomery, thus bypassing their major switchyard (EOLA) and reducing potential congestion They were not interested Because of this we did not execute our option to acquire the quarry

In July 2004 we were contacted by the BNSF and again approached this project. We told them in order to start this operation we would need to temporarily utilize one of their tracks in the "Sheep Yard" (a five track switch yard adjacent to our property). We were told that they needed all the tracks in order to serve other industry in Montgomery We pointed out that we would only utilize the track for four hours during the day for unloading and since their switching was done at night there should be no conflict We said we would even be willing to do the local switching We were unable to come to terms with the BNSF This caused us to table the discussion

Starting in July 2006 and leading to a meeting with BNSF Operations in September 2006 we again approached the subject and were told that if we could come up with a source on the line that ran from Galesburg to Eola through

Montgomery we may be able to work something out, but that we could not utilize the existing Sheep Yard track due to heavy usage. We once again offered the possibility of performing the switching. We have been unable to locate a limestone deposit of sufficient quality on that line, but have continued to look.

In October 2007 we talked with the current owner of the Savanna Quarry. Since that time we have been working with Savanna Quarry, Galesburg Economic Development Agency (Gerda) and the BNSF to move stone from Savanna to Montgomery and Galesburg, Illinois. The BNSF has also increased the requirement to a minimum 60 car unit train. Due to construction of two ready mix plants on the property since the inception of this project, we no longer have a property foot print that will allow a 60 car load out. The BNSF has once again said that serving us will be a problem as there is not enough room in the Sheep Yard to allow us to work there. I brought Ben Guido of Via Rail Logistics to Montgomery for a site evaluation. He agrees that there is room to build at least one more track in the Sheep Yard. We have offered to construct that track in return for access to the track closest to our property. We have also mentioned our sister company, Chicago Port Railroad Company (CPC) would be willing to provide switching service where necessary.

On April 4, 2008 I was advised of a notice (38896 SERVICE DATE – April 3, 2008) that Burlington Junction Railway (BJRY) was acquiring 2.5 miles of BNSF track in Montgomery, Illinois from the BNSF. Aggregate is a low value commodity and can not stand high freight rates. The addition of another rail carrier in our routing would probably remove all chance of a successful outcome. Since I have no information on how this will effect our proposed operation I must petition to revoke this exemption.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Betts", written in a cursive style.

Bruce A. Betts,  
Vice President – Business Development

**VERIFICATION**

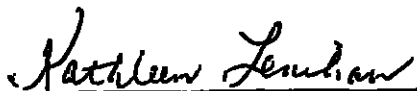
STATE OF ILLINOIS       )  
                                  ) SS:  
COUNTY OF COOK       -)

BRUCE BETTS, being duly sworn on oath, deposes and states that he has read the foregoing responses, that he knows the contents thereof, and that the facts therein stated are true and correct



  
\_\_\_\_\_  
BRUCE BETTS

SUBSCRIBED AND SWORN to  
before me this 9<sup>th</sup> day  
of April, 2008.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: 1/29/2010

**CERTIFICATE OF SERVICE**

I hereby certify that on April 10, 2008, I served the foregoing document, Petition For Rejection Or Stay, by e-mail and UPS overnight mail on John D Heffner, *j heffner@verizon net*, John D Heffner, PLLC, 1750 K Street, N W., Suite 350, Washington, DC 20006, and by e-mail on James H M Savage, *jsavagelaw@aim com*, 1750 K Street, N W., Suite 350, Washington, DC 20006

*Thomas F. McFarland*

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Thomas F. McFarland